IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES	:
V.	: 00-CR-00655
NICHOLAS PANARELLA, Jr.	:

ORDER

AND NOW, this day of , 2010, it is hereby ORDERED and DECREED that the conviction in the above-captioned matter is hereby vacated.

BY THE COURT:

__________________________________ J.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES	:
V.	: 00-CR-00655
NICHOLAS PANARELLA, Jr.	:

MOTION TO VACATE JUDGMENT OF HONEST SERVICES FRAUD CONVICTION

Nicholas Panarella, Jr., by his attorneys, Peter C. Bowers, Esquire, and Jerome M. Brown, Esquire, hereby move this Court to vacate Petitioner's conviction under the Honest Service Fraud statute and, in support thereof, states the following:

1. Petitioner, Nicholas Panarella, Jr., was arrested and indicted under the so called honest services fraud statute, pursuant to 18 U.S.C. §1346.
2. After a grant jury returned an indictment charging Panarella with seven counts of aiding and abetting mail fraud and wire fraud in violation of 18 U.S.C. §§2, 1341, 1343 and 1346, Panarella moved to dismiss the indictment for failure to state a federal crime. The Honorable Marvin Katz denied the Motion.
3. Panarella subsequently signed a plea agreement in which he agreed to plead guilty to a superseding Information, charging him with one count of being an accessory after the fact to a wire fraud scheme to deprive the public of State Senator F. Joseph Loeper, Jr.'s honest services as a legislator.
4. The superseding Information alleged that Loeoper had engaged in an honest services wire fraud scheme in violation of 18 U.S.C. §§1343 and 1346 and charged Panarella with being an accessory after the fact in violation of 18 U.S.C. §3.

5. Panarella agreed to enter into an unconditional plea of guilty to the superseding Information and was sentenced to six months in prison to be followed by one year of supervised release, and a fine of $20,000. Thereafter, Panarella appealed to the Third Circuit, alleging that the superseding Information was insufficient to plead a crime. Furthermore under F.R.Cr.P. 11(f) a sufficient factual basis did not exist for Judge Katz to accept the guilty plea. However, the Third Circuit affirmed the conviction. See, **United States v. Panarella**, 277 F.3d 678 (3rd. Cir. 2002). That Court held that the circumstances of that case – Senator Loeper's concealed financial interest as a paid consultant to defendant's business, and when the Senator spoke and voted against legislation that would have harmed defendant's business – was sufficient to establish that Senator Loeper committed honest services fraud in violation of the wire fraud statute.

6. A Petition for Writ of Certiorari was denied by the Supreme Court. See, **Panarella v. United States**, 537 U.S. 819, 123 S.Ct. 95 (2002)(Mem).

7. Recently, the Supreme Court in **Skilling v. United States**, 130 S.Ct. 2896 (6/24/10), narrowed the scope of the honest services fraud statute to cover "only . . . bribe-and-kickback" schemes of public officials. As a result of this ruling, it is no longer a federal crime for state public officials to corrupt their public offices by engaging in undisclosed self-dealing.

8. Mr. Panarella was convicted of such undisclosed self-dealing, and this new interpretation of §1346 does not cover the undisclosed self-dealing that Mr. Panarella allegedly committed.

9. Since Petitioner has already served his sentence and is no longer in custody, it is respectfully submitted that he is entitled to relief under the doctrine of error coram nobis as Mr. Panarella suffers from the continuing public opprobrium of his well-publicized trial.

10. For the above reasons, and the reasons set forth in the attached Memorandum of Law in Support of this Motion, it is respectfully submitted that the conviction in this case should be vacated.

WHEREFORE, it is respectfully submitted that this Court should vacate the conviction in this case.

Respectfully submitted,

Peter C. Bowers, Esquire

Jerome M. Brown, Esquire
Attorneys for Nicholas Panarella

IN THE UNITED STATES DISTRICT COURT
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UNITED STATES	:
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MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR ERROR CORUM NOBIS RELIEF

Petitioner, Nicholas Panarella, Jr., was arrested, charged and pled guilty under the so called honest services fraud statute as an accessory after the fact. See, 18 U.S.C. §3 and §1346. Prior to the recent ruling in **Skilling v. United States**, 130 S.Ct. 2896 (6/24/2010), this statute was used to charge public officials with a vast array of fraud schemes. However, the Supreme Court's ruling severely narrowed the scope of the honest-services fraud statute to cover only bribery and kickback schemes of public officials. **Id.** at 2932-33.

As a result of this ruling, it is no longer a federal crime for state public officials to corrupt their public offices by engaging in undisclosed self-dealing. In fact, the Court specifically declined to accept this interpretation of the statute. Id. at 2932. This new restricted interpretation of the statute does not cover the undisclosed self-dealing that Nicholas Panarella, Jr., allegedly committed in connection with his involvement with State Senator F. Joseph Loeper, Jr. Hence, it is respectfully submitted that Mr.

Panarella is entitled to have his conviction vacated even though the service of his sentence was completed years ago.

The alleged scheme reflects that Loeper failed to disclose income that he had received from Panarella. It was alleged that in the beginning of 1994, while Majority Leader of the Pennsylvania Senate, Loeper supported Panarella's business development efforts by appearing with him before local governments in Pennsylvania and attending meetings with the Secretaries of two Pennsylvania State agencies in an attempt to obtain state collection contracts for Panarella, who had entered into contracts with various state and local government bodies to collect state tax owed to them under state and local tax laws. Loeper also allegedly spoke and voted against proposed legislation that would have restricted the enforcement of the business privilege tax against non-resident businesses and significantly harm Panarella's business.

Loeper allegedly failed to disclose income received from Panarella as required under state law, filing false Statements of Financial Interest to the Pennsylvania Ethics Commission for the calendar years 1993 through 1997. Panarella allegedly directed third parties to make payments to Loeper on Panarella's behalf, although the Government did not specifically allege that Panarella reimbursed these third parties.

On appeal, Panarella urged the Third Circuit to find that the Government had not charged an actual crime and further that there was not a factual basis for the Honorable Marvin Katz to accept the plea pursuant to F.R.Cr.P. 11(f). In a lengthy Opinion, the Court rejected these claims.

The superseding Information in this case charged that:

> On or about September 8, 1997, in the Eastern District of Pennsylvania defendant Nicholas Panarella, Jr., knowing

> that an offense against the United States had been committed, namely, wire fraud in violation of Title 18 United States Code Section 1343 and 1346, knowingly and willfully assisted F. Joseph Loeper, Jr. in order to hinder and prevent Loeper's apprehension, trial and punishment by editing the response from S.R. to the reporter so as to continue to conceal the financial relationship between Panarella and Loeper, in violation of Loeper's duty to provide honest services.

Thus, the essence of the Information can be summarized as the failure to disclose an otherwise lawful relationship. The disclosure requirement is embedded within a yearly Commonwealth of Pennsylvania Ethical Statement filed by Commonwealth Elected Officials and Employees.

In discussing the issues in Panarella's case, the Court noted that honest-services fraud typically occurs under two scenarios: (1) bribery where a legislator was paid for a particular decision or action; or (2) failure to disclose a conflict of interest resulting in personal gain. 277 F.3d at 690 (Citation omitted).

More specifically, the Court stated the following:

> "Because the superseding Information does not allege that Panarella **bribed** Loeper, the question presented by the appeal is under what circumstances non-disclosure of a conflict of interest rises to the level of honest services fraud."

Ibid. (emphasis added).

Panarella did not dispute that the senator concealed a financial interest in Panarella's business contrary to Pennsylvania's disclosure statute, which criminalized such conduct. Id. at 679, 690. Instead, Panarella argued that, in the absence of an allegation that the senator misused his office for personal gain, the superseding information failed to state an offense. Id. at 691-92. The Court rejected this argument, holding instead that "where a public official takes discretionary action that the official knows will directly benefit a financial interest that the official has concealed in violation of a state criminal law, that official has deprived the public of his honest services under 18 U.S.C. §1346." Id. at 691.

In stating this holding, the Court also specifically rejected Panarella's argument that an allegation of bribery or other misuse of office is necessary to sustain a conviction for honest services wire fraud. Id. at 697.

Thus, it is respectfully submitted that given **Skilling**'s limitation of the honest-services fraud statute to remove this type of undisclosed self-dealing charged herein (which becomes even more convoluted because it was alleged that Panarella was an accessory after the fact) this decision compels that this Honorable Court grant this writ of error coram nobis.

ARGUMENT

The Court may grant writs of coram nobis in criminal matters, pursuant to the All Writs Act, 28 U.S.C. §1651. **United States v. Stoneman**, 870 F.2d 102, 105 (3rd Cir. 1989) (citing **United States v. Morgan**, 346 U.S. 502 (1954)). The writ of error coram nobis is an extraordinarily remedy that is used to "'fill in the gaps' in post-conviction remedies." **United States v. Jefferson**, 332 Fed. App'x 719, 721 (3rd. Cir. 2009) (Citing **United States v. Valdez-Pacheco**, 237 F.3d 1077, 1079 (9th Cir. 2001)). It is "an extraordinary tool to correct a legal or factual error" that may only be granted in "extreme cases." **United States v. Denedo**, 129 S.Ct. 2213, 2221-2223 (2009).

As the Supreme Court explained in **Morgan**, coram nobis relief is available after a sentence has been served because "the results of the conviction may persist.

Subsequent convictions may carry heavier penalties, civil rights may be affected." Id. at 512-13, 74 S.Ct. 247. Indeed, Mr. Panarella has been disbarred from the practice of law.[1]

The Court may issue a writ if the following requirements are met. The petitioner must show that he is "no longer 'in custody for purposes of 28 U.S.C. §2255" and is "suffering from the continuing consequences of the allegedly invalid conviction." **Stoneman**, 870 F.2d at 106 (citing **Morgan**, 346 U.S. at 512-13). The petitioner must also show that "no remedy [was] available at the time of trial" and that "sound reasons exist for failing to seek relief earlier." **Stoneman**, 870 F.2d at 106 (citing **Morgan**, 346 U.S. at 512). Finally, the petitioner must show that the writ is needed to correct a "fundamental" error, "such as to render the proceeding itself irregular and invalid." **Stoneman**, 870 F.2d at 106 (quoting **United States v. Cariola**, 323 F.2d 180, 184 (3rd Cir. 1963)). The Petitioner bears the burden to overcome the presumption that the earlier proceedings were correct. **Stoneman**, 870 F.2d at 106.

As a threshold requirement, the parties must show that Panarella is not in custody for purposes of 28 U.S.C. §2255. **Stoneman**, 870 F.2d at 106. Petitioner has served his sentence and is no longer on supervised release. He is not considered "in custody" for purposes of relief under §§2255 and 2241. See **United States v. Baird**, 312 Fed. App'x. 449, 450 (3d. Cir. 2008). Hence, as a threshold matter, he is not in custody and coram nobis relief is now available to him.

Moreover, at the time of Mr. Panarella's conviction, the honest-services fraud statute was given the broadest of interpretations. A look at the progression of the use of that statute provides an interesting backdrop as to why that statute seemingly applied to Mr. Panarella's actions at the time of his arrest and conviction. Therefore, "no remedy was available at the time of trial" and "sound reason existed for failing to seek relief earlier". Indeed, the Third Circuit rejected Mr. Panarella's attacks against both the statute and the sufficiency of the evidence, and the Supreme Court denied the Writ of Certiorari.

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[1] The Supreme Court reiterated in **Spencer v. Kemna**, 523 U.S. 1 (1998): "it is an obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences." Id. at 12.

The original mail fraud statute was enacted by Congress in 1872. **Skilling**, **supra** at 2926. The Fifth Circuit case of **Shushan v. United States**, 117 F.2d. 110 (5th Cir. 1941), is generally "credited with first presenting the intangible-rights theory as a theory of mail fraud prosecution." 130 S.Ct. at 2926. Through the use of the intangible rights theory, federal prosecutors began to use the mail fraud statute to prosecute corrupt state public officials under the theory that their corrupt service conduct defrauded the public of its honest services from public servants. Id. at 2926-27 & n. 36.

On June 24, 1987, after years of successful prosecution of corrupt public state officials, under an intangible-rights theory, the Supreme Court "stopped the development of the intangible rights doctrine in its tracks". Id. at 2927. In **McNally v. United States**, 483 U.S. 350, 360 (1987), the Supreme Court held that §1341 was limited in scope to the protection of property rights and did not prohibit schemes to defraud citizens of their intangible rights to the honest services from public officials. The Supreme Court noted, however, that "[i]f Congress desires to go further, it must speak more clearly". Ibid.

On November 18, 1988, just sixteen months after the Supreme Court's ruling in **McNally**, Congress reinstated the "intangible-rights theory by enacting 18 U.S.C. §1346 with the purpose of restoring the honest services fraud prosecutions to their pre-**McNally** status." 134 Cong.Rec.H.11251 (Daily Ed. Oct. 21, 1988) (statement of Rep. Conyers)). In the two decades since the passage of §1346, federal prosecutors have relied on the honest-services fraud statute to prosecute numerous alleged corrupt public officials, such as Loeper. During such time the Circuit Courts have been unanimous in their unwillingness to "throw out the statute as irremediably vague". 130 S.Ct. at 2928.

On June 24, 2010, exactly twenty-three years after its ruling in **McNally**, the Supreme Court significantly narrowed the scope of the statute. In **Skilling**, the Court held that while the honest services fraud statute allowed for federal prosecution of local officials based on bribes and kickbacks, the statute did not cover prosecutions based on undisclosed, self-dealings by public officials, the theory used by the Government in many of its prosecutions, and the theory used here. Id. at 2930-34.

It is noteworthy that the Supreme Court's ruling in **McNally** was retroactively applied, notwithstanding the fact that it was a non-constitutional decision concerning the reach of a federal statute, rather than a substantive decision on the scope of a constitutional guarantee. **United States v. Shelton**, 848 F.2d 1485, 1489 (10th Cir. 1988); see also, **United States v. Mandell**, 862 F.2d 1067, 1074-75 (4th Cir. 1988).

It has further been held that the decisions of the Supreme Court construing substantive federal criminal statutes must be given retroactive effect. **Bousley v. United States**, 523 U.S. 614, 620-21, 118 S.Ct. 1604 (1998).

As noted in **Skilling**, the Circuit Courts had been unanimous in their unwillingness to "throw out the statute as irremediably vague", and that decision has rendered the acts of Mr. Panarella no longer criminal. Thus, there was clearly no remedy available to him until the **Skilling** decision was promulgated, and it is clear that sound reason existed for failing to seek the relief earlier as no Court anywhere had ruled that the statute did not apply to such cases including the Third Circuit and Supreme Court which rejected his appeal.

It is clear that Mr. Panarella is no longer in custody and is suffering from the continuing consequences of the invalid conviction which has affected both his status as a lawyer and his employment status. Because of the fraud conviction, he no longer can pursue a number of avenues of employment, including the tax collection efforts that he had made previously.

In addition, Mr. Panarella also has another area of expertise in which he has been denied employment. He was a decorated Special Forces Officer who served several over seas military assignments, including war time service in the Republic Viet Nam. He has been precluded from working as a Special Forces Operator (as a private contractor) as he cannot obtain a Security Clearance due to his conviction. Thus, he continues to be affected with civil consequences because of his conviction.

Accordingly, it is submitted that Mr. Panarella meets all of the tests for relief under the writ of error coram nobis. It is respectfully requested that this Honorable Court vacate the conviction in this case.

Respectfully submitted,

Peter C. Bowers, Esquire

Jerome M. Brown, Esquire
Attorneys for Nicholas Panarella